

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

ACS of Alaska, Inc.,	)	
ACS of Fairbanks, Inc., and	)	
ACS of the Northland, Inc.	)	
	)	
Petition to Amend Section 51.405 of the	)	
Commission's Rules to Implement the	)	
Eighth Circuit's Decision in <i>Iowa Utilities</i>	)	
<i>Board v. FCC</i> Regarding the Burden of	)	
Proof in Rural Exemption Cases Under	)	
Section 251(f)(1) of the Communications Act	)	CC Docket No. 96-98

**Comments of the  
Regulatory Commission of Alaska**

Date: November 9, 2001

/s/ \_\_\_\_\_  
G. Nanette Thompson, Chair

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**Comments of the Regulatory Commission of Alaska  
on ACS Petition for Reconsideration**

The Regulatory Commission of Alaska (RCA) welcomes the opportunity to comment on the ACS<sup>1</sup> Petition for Reconsideration of the Common Carrier Bureau Order, released August 27, 2001, denying ACS's March 5, 2001, petition for rulemaking. The Regulatory Commission of Alaska opposes any reconsideration of the August 27, 2001, Order. We disagree with the underlying premise of the ACS Petition that there is a need for a "national" rule to clarify Section 251(f) of the Telecom Act<sup>2</sup> to give it what the Eighth circuit described in *Iowa Utilities Board II*<sup>3</sup> as its "plain meaning." Such

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<sup>1</sup> This Petition was filed by the ACS Rural Subsidiaries, ACS of Alaska, Inc., ACS of Fairbanks, Inc. and ACS of the Northland, Inc.

<sup>2</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996)(codified as amended in scattered sections of 47 U.S.C.).

<sup>3</sup> *Iowa Utilities Board v. F.C.C.*, 219 F.3d 744 (8th Cir. 2000).

a rule could interfere with ongoing proceedings before the Alaska courts, and have the effect of disrupting competition that has been initiated in Alaska cities in accordance with requirements of the Telecom Act.

There is no reason to promulgate a rule that is a redundant statement of a statutory mandate. If the burden of proof is as clear as ACS contends, little is accomplished by restating that rule in regulation. In Alaska we do not, as a general rule in our own regulatory practice, merely restate what a statute already requires for several reasons. Paraphrasing or restating a statute does not add to the force of the statute, nor does it implement, interpret or make the statute specific. But restating a statutory provision can create confusion as to whether the regulation was merely a helpful restatement of the law or an effort to actually add something of a different substantive meaning to the law.

Furthermore, ACS's purpose in its Petition for Reconsideration is not a genuine attempt to establish a "national rule." Rather, it is aimed directly at influencing pending litigation in Alaska. We are not aware of what impact the proposed "national rule" would have outside of Alaska. But in Alaska, the rule ACS seeks could reverse or further delay regulatory and

judicial proceedings that have been in progress since shortly after the Telecom Act was passed.

More than two years ago, on October 11, 1999, we terminated the Section 251(f) rural exemptions for the ACS Rural Subsidiaries serving our capital city of Juneau and our major interior city of Fairbanks. Our termination order came after a remand in which an Alaska superior court judge held that state law required our predecessor agency, the Alaska Public Utilities Commission, to impose the burden of proof for termination of the rural exemption on the incumbent local exchange carrier. The court's order was in accordance with FCC Rule 51.405(a), the valid and prevailing rule at the time.

After we terminated ACS's rural exemption, an interconnection agreement was arbitrated between ACS and GCI<sup>4</sup>. ACS has appealed both orders: the termination of the exemption to the Alaska state courts and the arbitrated interconnection agreement to the U.S. District Court for Alaska. Among the issues raised by ACS in its state court appeal is the burden of proof. Based on the Eighth Circuit's decision striking the FCC burden of proof rule,<sup>5</sup> ACS requested that the Alaska superior court vacate the order terminating ACS's rural exemption. The superior court refused ACS's request after considering application of the Alaska "law of the case" doctrine under

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<sup>4</sup> GCI Communication, Inc.

<sup>5</sup> Iowa Utilities Bd. II, 219 F.3d 744 at 762.

which the court will not disturb decisions that have been made under the prevailing rule at the time, particularly where there is some reliance on those decisions. After the superior court rejected ACS's argument, ACS sought the same relief from the Alaska Supreme Court, which similarly refused to vacate the termination order.

ACS's arguments in its Petition for Reconsideration make clear that it wants this Commission to adopt a rural exemption burden of proof rule specifically for the purpose of gaining an advantage in its Alaska court litigation. ACS's ultimate goal is forestalling the advent of competition. In the absence of any evidence that the FCC rule ACS seeks would have an impact anywhere but Alaska, and with the knowledge that the requested rule would produce a result antithetical to the Act, the Commission should decline to adopt a rule that would appear designed to intrude in the Alaska court proceedings.

RESPECTFULLY SUBMITTED this 9th day of November, 2001.

/s/  
G. Nanette Thompson, Chair  
Regulatory Commission of Alaska